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No. 94-265

In the Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD E. WIKBERG, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRA), 38 U.S.C. 4212 (Supp. IV 1992), requires parties who contract with the United States to agree to certain affirmative action requirements with respect to the employment of Vietnam-era veterans, and allows veterans to file complaints of noncompliance with the Secretary of Labor, who is instructed to "investigate such complaint and take appropriate action."

The question presented is whether VEVRA accords veteran employees of such contractors a "property right" in continued employment and, if so, whether the Fifth Amendment's Due Process Clause prevents the Department of Labor from deciding not to take action against the contractor without affording a complaining employee procedural protections such as the opportunity to cross-examine and otherwise test the credibility of witnesses.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 30-38) is reported at 21 F.3d 188. The opinion of the district court (Pet. App. 39-53) is reported at 62 Empl. Prac. Dec. (CCH) ¶ 42,618.

JURISDICTION

The court of appeals entered its judgment on April 7, 1994. A petition for rehearing was denied on May 6, 1994. Pet. App. 65. The petition for a writ of certiorari was filed on August 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioner incorrectly lists "Richard B. Reich" as respondent.

STATEMENT

1. The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRA), 38 U.S.C. 4211 *et seq.* (Supp. IV 1992), requires parties who contract with the United States to agree to take affirmative action to employ and advance in employment Vietnam-era veterans. 38 U.S.C. 4212(a) (Supp. IV 1992). The Act also entitles a Vietnam-era veteran who believes a contractor has violated the Act to file a complaint with the Secretary of Labor, and requires the Secretary to "promptly investigate such complaint and take appropriate action in accordance with the terms of the contract and applicable laws and regulations." 38 U.S.C. 4212(b) (Supp. IV 1992). Pursuant to regulations promulgated by the Secretary, the Department of Labor's remedies for noncompliance include withholding progress payments to contractors, terminating contracts, barring contractors from receiving future contracts, and "within the limitations of applicable law, seek[ing] appropriate judicial action." 41 C.F.R. 60-250.28(b)-(e).

2. Petitioner is a Vietnam-era veteran who obtained employment in March 1985 as a sales manager with Moore Business Forms, a government contractor. Petitioner alleges that he was hired even though he did not meet the firm's usual qualifications for the post. Pet. App. 31, 57; Pet. 10-11. In October 1986, Moore terminated petitioner, claiming that his performance had been unsatisfactory. Pet. App. 31-32. Petitioner thereupon filed a complaint with the Department of Labor, alleging that the termination violated VEVRA.[2]

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[2] At the time petitioner filed his complaint, the relevant VEVRA provisions were codified at 38 U.S.C. 2011 *et seq.* The provisions have since been recodified. See Department of Veterans

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) investigated petitioner's complaint. See 41 C.F.R. 60-250.25. In March 1988, OFCCP notified petitioner that it had found no evidence that his status as a veteran had had any impact on his termination. Pet. App. 61. Instead, OFCCP found that Moore, which employed a number of Vietnam-era veterans in responsible positions, had fired petitioner because of documented problems with his performance—problems about which petitioner had been warned, yet failed to correct. *Ibid.* On petitioner's request for reconsideration,[3] the Director of OFCCP, in August 1988, ruled that the earlier determination had been correct. He noted that Moore's files contained numerous records reflecting petitioner's "unsatisfactory job performance and poor communications with [his] peers and subordinates" (*id.* at 63), and found no evidence that petitioner's termination was related to his status as a Vietnam veteran. *Id.* at 62-64. The Department of Labor therefore concluded its review of petitioner's complaint without taking any action against Moore. *Id.* at 42, 64.

Affairs Codification Act, Pub. L. No. 102-83, § 5, 105 Stat. 406 ; Pet. 10.

[3] Petitioner's appendix omits the last paragraph of OFCCP's March 1988 notification (R 12 Exh. B) which states:

> As set forth in 41 CFR 60-741.6(g), the Director of the Office of Federal Contract Compliance Programs may, for reasonable cause, reconsider or order the reconsideration of this determination. A request for reconsideration based on reasonable cause should be addressed, within 30 days, to the Director, OFCCP, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, D.C. 20210. Such a request should be accompanied by affidavits, signed testimony of supervisory or fellow workers, or other written documentation that would substantially alter our findings in this case.

3. In November 1991, petitioner brought suit in federal district court against the Secretary of Labor, alleging that the Department's action violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 42. The district court dismissed this complaint on the ground that the Department's enforcement decision was unreviewable under the Administrative Procedure Act. *Ibid.* Petitioner then filed an amended complaint alleging, *inter alia*, that OFCCP had violated his due process rights by not allowing him to present his own evidence controverting his employer's evidence, or to cross-examine or otherwise challenge the veracity of the evidence that his employer, Moore, had submitted to the Department in response to the investigation. *Id.* at 33, 40.[4]

The district court dismissed the amended complaint for failure to state a claim. Pet. App. 39-53. The court held that VEVRA does not provide veterans such as petitioner with a constitutionally protected property interest in employment. Instead, it held, the Act merely gives veterans a right to petition the Department of Labor to enforce an employer's obligations under that statute. *Id.* at 44-49. The court also concluded that the Department's decision not to take action against Moore did not give rise to a due process violation because it was an investigatory, not an adjudicatory, proceeding, and traditional notions of due process do not attach to such fact-finding investigations. *Id.* at 49-50.

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[4] Petitioner also argued below that OFCCP violated the Equal Protection component of the Fifth Amendment's Due Process Clause, and that he was a third-party beneficiary of a contract between the government and his employer. Pet. App. 35, 38. As the court of appeals noted, petitioner failed properly to raise or to preserve these claims, *ibid.*, and he has not pursued them in this Court.

4. The court of appeals affirmed. Pet. App. 30-38. It found no due process violation because petitioner lacked a constitutionally protected property interest. *Id.* at 35. The court explained that petitioner was an employee at will, and, as such, had "no legal right of any sort to continued employment." *Ibid.* Moreover, the court held, even if petitioner had an employment contract of fixed duration giving rise to a contractual property right, he was deprived of that right not by the Department of Labor, but by his employer, Moore. *Id.* at 36. Nor, the court held, did any failure by the Department to protect petitioner's asserted property rights by taking action against Moore "count as a deprivation of that interest by the government itself." *Ibid.* (citing *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989)). Finally, the court rejected petitioner's claim that VEVRA, by imposing a duty of prompt investigation and appropriate action, conferred a property interest beyond "the usual 'right' to the aid of the law enforcement authorities." Pet. App. 37. Procedural rights, the court held, "are not rights of liberty or property within the meaning of the due process clause." *Id.* at 38 (citing, *inter alia*, *Olim* v. *Wakinekona*, 461 U.S. 238, 250-251 (1983)).

ARGUMENT

Petitioner renews his claim (Pet. 17-28) that VEVRA accords him a constitutionally protected property interest in continued employment and that he was unconstitutionally deprived of that interest when the Labor Department elected not to take action against his employer. Petitioner's claim is without merit under well-settled authority of this Court, and the decision below presents no circuit conflict warranting review. Accordingly, review should be denied.

1. To establish a due process violation, a party must first establish the existence of a property interest in existing rules or understandings outside the Constitution. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Such an interest must be based on a legitimate claim of entitlement, not on a mere desire or unilateral expectation of receiving a benefit. *Roth*, 408 U.S. at 577. Moreover, procedural safeguards do not by themselves "create an independent substantive right" protected by the Due Process Clause. *Olim* v. *Wakinekona*, 461 U.S. 238, 250-251 & n.12 (1983); see *Hewitt* v. *Helms*, 459 U.S. 460, 471 (1983). Such a right is created only if the governing statute or regulation contains "specific directives to the [governmental] decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Kentucky Dep't of Corrections* v. *Thompson*, 490 U.S. 454, 463 (1989).[5]

A party claiming a due process violation based on deprivation of a property right must further establish that the deprivation of that right was the result of governmental, and not merely private, action. *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 (1989); *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 547 (1987). The government is responsible for a private decision "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *San Francisco Arts*, 483 U.S. at

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[5] Although *Olim* and *Kentucky Department of Corrections* involved liberty interests, the same principles apply to the creation of property interests. See, *e.g.*, *Tarpeh-Doe* v. *United States*, 904 F.2d 719, 722-723 (D.C. Cir. 1990), cert. denied, 498 U.S. 1083 (1991).

546. Absent "certain limited circumstances," *DeShaney*, 489 U.S. at 198-200, such as where the government has assumed the custody of persons against their will, the government has no affirmative duty to protect the property of an individual against invasion by private actors, and "'[m]ere approval of or acquiescence in the initiatives'" of the private actor "is not enough." *San Francisco Arts*, 483 U.S. at 547.

Petitioner has failed to establish either a cognizable property interest or a deprivation of that interest by the government. As the court held (Pet. App. 35), petitioner, an at-will employee, had no contractual right to continued employment that was abridged by his termination. And, contrary to petitioner's claim (Pet. 22), neither VEVRA nor the Department of Labor's regulations that require contractors to agree not to discriminate against veterans (see 41 C.F.R. 60-250.4) give petitioner a property right in not being terminated based on his status as a veteran. Neither VEVRA nor its regulations explicitly establish such a right, nor do they contain mandatory language placing substantive limits on the Department's enforcement discretion. See *Olim*, 461 U.S. at 250-251 & n.12; *Kentucky Dep't of Corrections*, 490 U.S. at 463. Thus, as the court of appeals concluded, the Department's "duty of prompt investigation and appropriate action" created no property interest within the meaning of the Due Process Clause. Pet. App. 37-38; *id.* at 45 ("[t]he only right created by VEVRA is the right to petition the Department of Labor to enforce the employers' contractual obligations created by the statute"). See *Harris* v. *Adams*, 873 F.2d 929, 932 (6th Cir. 1989) (holding that VEVRA does not authorize private rights of action); *Barron* v. *Nightingale Roofing, Inc.*, 842 F.2d 20, 22 (1st Cir. 1988) (same). VEVRA is thus analogous

to parallel statutes requiring federal contracts to contain affirmative action clauses, which have uniformly been held not to create an entitlement to employment. See, *e.g.*, *D'Amato* v. *Wisconsin Gas Co.*, 760 F.2d 1474, 1479-1480 (7th Cir. 1985) (holding that the only right secured to handicapped persons by parallel provision of the Rehabilitation Act of 1973, 29 U.S.C. 793, was the right to file complaint against employer with Department of Labor); *Brown* v. *Sibley*, 650 F.2d 760, 764 (5th Cir. 1981); *Simpson* v. *Reynolds Metals Co.*, 629 F.2d 1226, 244 (7th Cir. 1980); *Rogers* v. *Frito-Lay*, 611 F.2d 1074, 1080 (5th Cir. 1980). The Department of Labor's refusal to take action against Moore thus did not deprive petitioner of a property interest.

Petitioner's reliance on *McGee* v. *Funderburg*, 17 F.3d 1122, 1125 (8th Cir. 1994), for the proposition that VEVRA accorded him an "earned entitlement" (Pet. 20) is misplaced. At issue in *McGee* were military retirees' health benefits, and the effect of the Civilian Health and Medical Program of the United States (CHAMPUS) upon continuation coverage under the Employee Retirement Income Security Act of 1974, (ERISA), 29 U.S.C. 1001 *et seq.* as amended by the Comprehensive Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, § 10002, 100 Stat. 227, 29 U.S.C. 1161-1168 (1988 & Supp. IV 1992). No claim under the Due Process Clause or VEVRA was raised in that case. The reference in *McGee* to veterans employment preferences as "entitlements" came simply in the course of listing various statutory benefits accorded for members of the armed forces "in gratitude for service to their country and as a means of enhancing and making more attractive service in the armed forces of the United States." 17 F.3d at 1125. *McGee* thus does not suggest that VEVRA creates any statutory entitlement in continued private

employment, the deprivation of which suffices to constitute a due process violation.[6]

The court of appeals also correctly held (Pet. App. 36-37), following *DeShaney*, that even if petitioner had established a property right in continued employment, the Department of Labor's failure to protect that right against the actions of a private party (Moore) would not constitute a governmental deprivation actionable under the Due Process Clause. Petitioner's reliance on the fact that he was hired pursuant to the contractual affirmative action provisions mandated by VEVRA (Pet. 27) is misplaced, for that fact does not establish that the Department had any role in Moore's decision to terminate petitioner, let alone that it exercised the coercive power or supplied the significant encouragement necessary for the Department to be held responsible under the Due Process Clause for his loss of employment. See *San Francisco Arts*, 483 U.S. at 546-547; see also *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985) ("when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect"); *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984) (Due Process Clause not implicated where an administrative investigation adjudicates no legal rights); *Hannah* v. *Larche*, 363 U.S. 420 (1960) (Due Process Clause does not

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[6] Petitioner errs in relying (Pet. 21) on *Miller* v. *Henman*, 804 F.2d 421 (7th Cir. 1986), and *Hill* v. *Group Three Housing Dev. Corp.*, 799 F.2d 385 (8th Cir. 1986), for the proposition that binding regulations with substantive criteria may create property interests. *Miller* held that a prisoner's transfer did not constitute a denial of due process, and *Hill* held that the denial of applications for housing assistance payments under a federal program did not constitute a denial of due process.

create right to participate in agency's nonadjudicative, factfinding investigation); cf. *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 114, 125-126 (1987) (decisions whether to file a complaint, as well as settlement or dismissal determinations, made without charging party's consent, are prosecutorial, not adjudicative).[7]

2. We are aware of no authority in conflict with the decision below. Nor is this a case with broad national implications warranting this Court's review. Although petitioner asserts (Pet. 28) that this case could affect potentially seven million Vietnam-era veterans in the labor force, VEVRA affects only those Vietnam-era veterans who work for or seek employment with employers who have contracts over $10,000 with the federal government. 38 U.S.C. 4212(a) (Supp. IV 1992); see also 41 C.F.R. 60-250.3(a) (including subcontracts). OFCCP has investigated a total of 813 complaints by such veterans in the last five fiscal years.

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[7] *Heckler* v. *Chaney* held that agency non-enforcement decisions are not reviewable under the Administrative Procedure Act, 5 U.S.C. 701-706, unless there is "law to apply." 470 U.S. at 834-835. While *Chaney* is not strictly dispositive here because petitioner's amended complaint alleged constitutional violations rather than an agency's failure to take enforcement action under its statutory authority, see Pet. App. 32-33, complaints challenging nonenforcement decisions under either VEVRA or analogous statutes have consistently been dismissed based on *Chaney*. See *Clementson* v. *Brock*, 806 F.2d 1402, 1404 (9th Cir. 1986) (Kennedy, J.) (Labor Department's nonenforcement decision under VEVRA not reviewable under APA because of absence of law to apply); *Giacobbi* v. *Biermann*, 780 F. Supp. 33, 36 (D.D.C.) (nonenforcement decision under Rehabilitation Act of 1973, 29 U.S.C. 793, not reviewable under APA), aff'd, No. 92-5095 (D.C. Cir. Oct. 6, 1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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